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August 25, 1999

EX PARTE OR LATE FILED

Ex Parte

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: CC Docket 96-98: Second Further Notice of Proposed Rulemaking in the Matter of the Local Competition Provisions in the Telecommunications Act of 1996

Dear Ms. Salas:

Yesterday, Mr. F. Gumper, Mr. J. Pachulski and I, representing Bell Atlantic met with Mr. L. Strickling, Mr. R. Atkinson, Ms. C. Mattey, and Mr. J. Jennings of the Common Carrier Bureau. The purpose of the meeting was to discuss Bell Atlantic's position on the use of unbundled network elements.

The attached paper further elaborates upon the Bell Atlantic position.

In accordance with Section 1.1206(a)(1) of the Commission's rules, an original and one copy of this notice are being submitted to the Secretary.

Sincerely,

Susanne Guyer

Attachment

cc: L. Strickling
R. Atkinson
C. Mattey
J. Jennings

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08/25/99

White Paper on the Substitution of Unbundled Network Elements For Special Access Services

Executive Summary

Competing carriers have offered special access transport services on a competitive basis for at least 14 years. Since this competitive activity developed well before the Telecommunications Act, these carriers provide their transport services without using any of the incumbent's unbundled network elements. Instead, they invested in their own fiber optic facilities and collocated their own equipment in the incumbents' central offices.

Competing carriers have already demonstrated that they are not impaired in their ability to provide special access services without using the incumbents' network elements on an unbundled basis. Since the statutory impairment test is not met for carriers that seek network elements to provide (or to substitute for) special access services, incumbent carriers cannot be required to provide network elements on an unbundled basis to competing carriers in order for them to provide special access services.

In addition, Congress expressly preserved the Commission's pre-existing system of access charges. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201" – the provision under which the Commission sets interstate access charges. And, Section 251(g) states that "each local exchange carrier . . . shall provide exchange access . . . to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and

obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment . . . " By incorporating the language "including receipt of compensation," Congress preserved incumbent LECs' existing rights, under Commission "regulation[s], order[s], or polic[ies]," to collect access charges from interexchange carriers.

The plain language Section 251(c)(3) does not require a different result. That section only addresses **where** access to unbundled network elements may occur. It does not address **what** elements must be unbundled. There is therefore no basis for allowing carriers to obtain access to unbundled network elements to provide (or to substitute for) special access services.

1. Competing Carriers Have Provided Special Access Services On A Competitive Basis For Many Years Without Using Unbundled Network Elements.

Section 251(d)(2) provides for unbundling of network elements only where "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2)(B). This statutory test must be applied to the specific service that the requesting carrier is planning to provide.[1] And where competing carriers are already providing particular telecommunications services (here, special access) without using the incumbents' network elements, this statutory threshold for unbundling is not met.[2]

Competing carriers have provided special access services on a competitive basis for many years without access to the incumbents' network elements on an unbundled basis. In fact, competing carriers began providing special access services long before Congress ever created the unbundling obligation in the 1996 Act.

Competing carriers began offering competitive transport services in the mid-1980s. The New York Public Service Commission authorized interoffice competition in 1985 and Teleport began building transport facilities in lower

[1] Of course, as the Commission and the 8th Circuit have pointed out, where a carrier seeks to substitute unbundled network elements for special access services, it is not "providing" a service at all – it is *purchasing* one.

[2] Because the necessary and impair standard must be applied on a service by service basis, access to unbundled network elements can't be made available for special access regardless of whether competing carriers have access to unbundled transport network elements to provide purely local services.

Manhattan, one of the most densely populated business centers in the world. By 1990, competing carriers had deployed 20 networks in 15 cities. U.S. Department of Commerce, *U.S. Industrial Outlook* at 33-37 (1990). The following year, the Commission found that "[r]ecent changes" – "most importantly, fiber optic technology" – "have facilitated the development of competition in the provision of [local access] facilities." *Expanded Interconnection with Local Telephone Company Facilities*, Notice of Proposed Rulemaking and Notice of Inquiry, 6 FCC Rcd 3259 (1991).

In 1994, in its *Expanded Interconnection* proceedings, the Commission again recognized both the feasibility and the reality of competition in the local market for interoffice transport: "interconnectors now are able to provide special access and switched transport transmission services in competition with the LECs." *Expanded Interconnection with Local Telephone Company Facilities*, Third Report and Order, 9 FCC Rcd 2718, at ¶ 4 (1994). In fact, the Commission predicted that competition in the interoffice transport market "could develop more rapidly than" it previously had in the long distance markets. *Expanded Interconnection with Local Telephone Company Facilities*, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369, 7380 n.37 (1992). By 1995, 29 competing carriers had deployed fiber optic networks in 104 cities. In 1996, the Commission again expressly found that "there are alternative suppliers of interoffice facilities in certain areas." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, ¶ 441 (1996).

In fact, the level of competition for interstate special access services has grown to the point that the Commission has decided to allow "competition, rather than regulation, to determine prices for interstate access services, thus providing customers more choices among services, carriers, and rates." FCC Press Release, Commission Adopts Pricing Flexibility and Other Access Charge Reforms (Aug. 5, 1999).

Since this competitive activity occurred long before the 1996 Act became law, it developed without any access to unbundled network elements. The Commission's *Expanded Interconnection* regime gave competitors what they needed to compete in this market and provided the appropriate incentives for competitors to build their own competing transmission facilities and to deploy their own transmission equipment in collocation arrangements. In fact, the Commission's *Expanded Interconnection* regime made collocation available to "all parties who wish to *terminate their own special access transmission facilities* at LEC central offices." *Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, ¶65 (1992) (emphasis supplied).

2. The Fact That Competing Carriers Have Successfully Provided Special Access Services For Many Years Without Using Unbundled Network Elements Establishes That They Are Not Impaired And That The Statutory Test For Unbundling Has Not Been Met.

Competitive carriers have provided competitive special access services either by building their own facilities or by leasing facilities from other carriers. They have not used the incumbents' unbundled network elements to provide their services.

In the Bell Atlantic region, for example, competitors have over 725,000 miles of fiber that they can and do use to provide their special access services. In the New York City MSA area alone, AT&T has 580 route miles of fiber, e.spire has 182 miles, MCI WorldCom has 172 miles, Time Warner has 157 miles and Local Fiber has 40 miles. UNE Fact Report, FCC Docket No. 96-98, Appendix B. Another 7 competing carriers also have their own fiber networks in New York City, but they have not revealed the number of miles covered by their networks. *Id.*

Similarly, in Philadelphia, AT&T has 565 route miles of fiber, NEXTLINK has 500 miles, and e.spire has 12 miles. *Id.* Another 7 carriers have fiber networks of unknown length. *Id.* In Washington, DC, 3 competing carriers have a total of 839 route miles, while another 8 competing carriers have fiber networks of unknown length. *Id.*, In addition, Boston, Baltimore, Buffalo, Providence, Pittsburgh and many other cities in the Bell Atlantic region have alternative fiber networks.

Competitors have connected their networks to over 625 Bell Atlantic central offices through over 2,300 collocation arrangements. They have also connected their networks to interexchange carrier points-of-presence and to hundreds of office buildings in each major metropolitan area. In fact, the Commission noted in the Bell Atlantic-NYNEX merger proceeding that "there are already a number of competitors offering [transport] services, and individual interexchange carriers (including MCI) often choose particular providers to carry large amounts of traffic on a dedicated basis." *Applications of NYNEX*

Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order, 12 FCC Rcd 19,985, at ¶ 111 (1997).

Moreover, competing carriers are not limited to providing special access services only through the facilities they build. There is a wholesale market developing for transport facilities and services that competing carriers can use to provide special access services. For example, Metromedia Fiber Networks "is a competitive optical provider ('COP') of local, exchange access, and interexchange private line services throughout the nation. MFN's business is focused on providing high-bandwidth, fiber optic communications infrastructure and services to communications carriers and corporate government customers." Comments of Metromedia Fiber Network Services, Inc., FCC Docket CC 98-141 (July 19, 1999). It recently "announced it will provide Time Warner Telecom with high-speed, high capacity dark fiber infrastructure in New York City and the New Jersey metropolitan area for a period of 20 years." Salomon Smith Barney Report, *MFN - 1Q99 Better Than Expected* (May 12, 1999). Metromedia also announced that it "would provide [Allegiance] with dark fiber in the New York metropolitan area." *Id.*

Another wholesale provider of transport services is e.spire. Last April, it announced a deal to provide transport facilities to another CLEC, GST Telecommunications, Inc., in Houston, Texas. E.spire Press Release, April 22, 1999. In fact, the availability of wholesale transport facilities is the basis for at least one competing local carrier's business plan:

> The rise of competition in the local telecommunications market has created an unprecedented opportunity for CLECs in the form of excess available capacity. The availability of dark fiber – i.e., unused, state-of-the-art fiber optic networks built by various third parties – on the open market is the factor driving Phase 2 of Allegiance's Smart Build Strategy. 1998 Allegiance Telecommunications, Inc. Annual Report, p. 16.

With these facilities, competing carriers can provide special access service to just about any customer that wants the service. For example, competing networks can now serve approximately *90 percent* of Bell Atlantic's special access transport customers. Bell Atlantic Petition for Forbearance at 1. And they can do so without using any unbundled network elements.

There is also no question that carriers are, in fact, successfully providing special access services without using unbundled network elements. In the Bell Atlantic region, for example, by the beginning of 1998, competitors were using their own networks to provide approximately 30 percent of the high capacity special access services and up to 50 percent in key business centers. *Id.*

Plainly, competing carriers are not be impaired in their ability to provide special access services without having access to incumbents' network elements on an unbundled basis. The statutory unbundling test is therefore not met with respect to any network elements to which a competing carrier seeks access for the purpose of providing (or to substitute for) special access services.

3. The 1996 Act Did Not Replace the Commission's Access Charge Regime with Unbundled Network Elements.

Congress expressly preserved the Commission's pre-existing system of access charges and did not replace it with an unbundling regime. Section 251(i) provides that "[n]othing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201" – the provision under which the Commission sets interstate access charges. *See MTS and WATS Market-Structure*, 93 F.C.C.2d 241, 255 ¶ 41 (1983). And, Section 251(g) provides:

> On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier . . . shall provide exchange access . . . to interexchange carriers . . . in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment . . . under any . . . regulation, order or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment.

By incorporating the language "including receipt of compensation," Congress preserved incumbent LECs' existing rights, under Commission "regulation[s], order[s], or polic[ies]," to collect access charges from interexchange carriers. *Competitive Telecom. Assn. v. FCC*, 117 F.3d 1068, 1072 (1997).

Had Congress not acted to maintain the Commission's access charge system, both incumbent LECs and new entrants would have suffered. Incumbent LECs would suffer a reduction in revenues without any reduction in costs, since they would continue to provide similar, if not the same, services to interexchange carriers, but at what in many instances will be greatly reduced rates. These revenue losses would undermine the ability of incumbent local

exchange carriers to deploy and maintain ubiquitous, high quality networks to the detriment of consumers and wholesale customers alike.

Competing local carriers would also suffer if Congress had not distinguished network elements from the Commission access charge system. They would have a much smaller revenue opportunity in competing with incumbents in providing special access services to long distance carriers when long distance carriers can simply purchase those same network elements directly from the incumbent in lieu of any exchange access services offered by the new entrant. This loss of revenue opportunity would discourage new carriers from building their own network facilities for special access services.

4. The Plain Language of Section 251(c)(3) Does Not Require a Different Result.

Section 251(c)(3) of the Act does not give carriers the unrestricted right to use any network element for any telecommunications service. As the 8th Circuit explained, that section simply describes **where** access to unbundled network elements should occur, not **which** network elements should be unbundled.

> [S]ubsection 251(c)(3) places a duty on incumbent LECs to provide "access to network elements on an unbundled basis at any technically feasible point." By its very terms, this provision only indicates *where* unbundled access may occur, not *which* elements must be unbundled. Subsection 251(d)(2) establishes the standards to determine which elements must be unbundled, and this subsection makes no reference to technical feasibility.

Iowa, 120 F.3d 753, 810 (8th Cir. 1997), *aff'd in part, rev'd in part sub nom. AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721 (1999). It is the "necessary and impair" standard of Section 251(d)(2) that must be met before an interexchange carrier can obtain a

network element on an unbundled basis for the service it seeks to provide. And as explained above, that standard is not met for special access services.

CONCLUSION

Given the extensive development of competitive transport services over a period of more than 14 years, incumbent carriers cannot and should not be required to unbundle interoffice transport facilities. Competitors have already demonstrated their ability provide these services by investing in their own facilities or by obtaining them from third parties on a wholesale basis. They don't need to use the incumbents' network elements and are not impaired without access to them. Nor do they need the windfall that would occur through a "repricing" of the special access services they receive today to unbundled network element rates.